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No. 93-2006

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BANCA NAZIONALE DEL LAVORO,
Petitioner,

v.

SMS HASENCLEVER GMBH,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia and the Court of Appeals of Georgia

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REPLY BRIEF FOR THE PETITIONER

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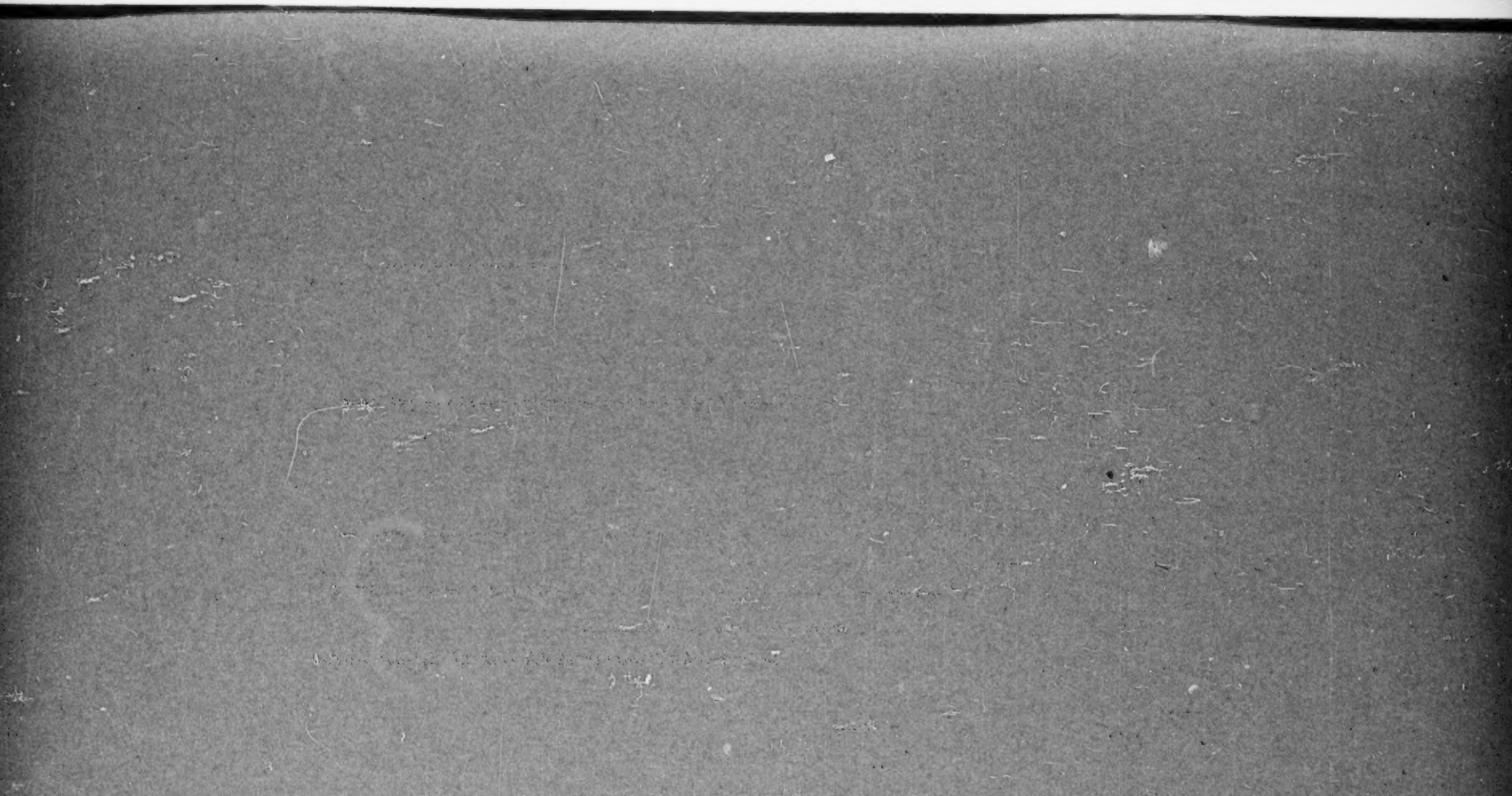

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1. Respondent claims that the Georgia Court of Appeals' decision rests entirely on state law grounds. Br. in Opp. 8-10. That claim is meritless. In this case, petitioner has asserted that it has an absolute defense under federal law to liability under state letter of credit law. The assertion of this federal defense clearly raises a federal issue as to the effect of 50 U.S.C. App. § 2407(a)(1)(F) and the Antiboycott Regulations. Moreover, the Georgia Court of Appeals expressly passed on the federal defense even though it misapplied the Antiboycott Regulations in its opinion. *See* Pet. App. 4a-6a. The Court of Appeals did not—nor could it under the Supremacy Clause—reject petitioner's federal defense on the merits by applying state law. Simply put, petitioner

asserted a federal defense to liability, and the law governing that defense is federal law, not state law.[1]

2. In this case, the Office of Antiboycott Compliance (OAC) of the Department of Commerce has advised both petitioner and respondent that 15 C.F.R. § 769.2(d) prohibits a bank in the United States from forwarding letter-of-credit documents containing anti-Israel clauses, even if the documents were submitted by a foreign beneficiary. Pet. App. 13a-14a; App., *infra*, 3a-4a.[2] Indeed, the OAC has specifically ruled that petitioner cannot forward the very documents at issue in this case and therefore cannot use them to seek reimbursement. For that reason, petitioner has asserted that it is entitled to the absolute defense against any payment obligation afforded domestic banks in these circumstances under 50 U.S.C. App. § 2407(a)(1)(F).

Respondent claims that the OAC opinion does not reflect the position of the Secretary and is, instead, merely "an informal letter . . . from a junior Commerce Department official," "an informal reading of the Antiboycott Regulations by a junior bureaucrat at the Commerce Department," "a junior bureaucrat's misreading of the law,"

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[1] Respondent accuses petitioner of concocting a defense under the Antiboycott Regulations to avoid payment. Respondent forgets that it—not petitioner—inserted the anti-Israel language in the letter of credit documents at issue. Respondent also forgets that it is the Office of Antiboycott Compliance—not petitioner—that has ruled that 15 C.F.R. § 769.2(d) prohibits petitioner from forwarding respondent's documents for reimbursement. Finally, respondent forgets that petitioner has already paid respondent millions of dollars on documents that did not have an antiboycott defect. Petitioner has concocted nothing; it is entitled to a defense under federal law due to respondent's insertion of anti-Israel language into the letter of credit documents.

[2] The Appendix to this Brief consists of a portion of the appendices, located at R. 884, to the brief in support of summary judgment that respondent filed in the Superior Court of Fulton County. Specifically, the Appendix consists of an affidavit filed by counsel for respondent and Exhibits "C," "D," and "E" thereto.

and "[t]he junior bureaucrat's opinion . . . not endorsed by any more senior Commerce Department official." Br. in Opp. 4, 6, 12; *see id.* at 11. That contention lacks merit as a matter of fact and law.

The position taken by the OAC in this case represents the considered judgment of the agency. Respondent itself during the course of this litigation directed inquiries to officials at every level of the agency from the Director on down, and the OAC repeatedly adhered to its position that 15 C.F.R. § 769.2(d) applies to domestic banks engaged in letter-of-credit transactions in the United States, even if those transactions involve a foreign beneficiary. App., *infra*, 1a-17a. Moreover, the record in this case shows that the OAC has enforced its position that 15 C.F.R. § 769.2 (d) applies to letter-of-credit transactions by issuing fines under that section to persons who violate it in the letter-of-credit setting. R. 420-25; Supp. R. 69, 135, 680-81. Finally, respondent acknowledged in a letter to the OAC that "we understand that *OAC* also believes that transmittal of the documents to Iraq is prohibited by Section 769.2(d) . . . ." App., *infra*, 14a (emphasis added). Accordingly, the OAC's determination that Section 769.2 (d) applies to letters of credit is hardly the offhand opinion of a "junior bureaucrat."

In any event, if the Court had any doubt on this score the appropriate course would be to invite the Solicitor General to express the views of the United States on this matter. That course also is an appropriate one in light of the nature of the legal issue involved. The question presented in the petition involves the interpretation of a federal agency's regulations, and it is well settled that "the administrative interpretation" in such circumstances is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *see also, e.g., Stinson v. United States*, 113 S. Ct. 1913, 1919

(1993).[3] For these reasons, the Court should call for the views of the Solicitor General if the Court were to have any doubt about the OAC's view of the question in this case.

The amicus brief filed by the U.S. Council on International Banking and the Institute of International Banking Law and Practice, Inc., on behalf of more than 370 banks underscores the importance of the question pre-

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[3] Respondent contends that OAC is wrong in applying Section 769.2(d) to letters of credit, because respondent believes Section 769.1(d)(20) makes Section 769.2(f)—which exempts foreign beneficiaries—the exclusive source of letter of credit regulation, and that no other regulation, including Section 769.2(d), can be applied to letter of credit transactions.

Respondent's interpretation, however, is not the only, or even the most logical, interpretation permitted by the regulations. Respondent fails to tell the Court that 15 C.F.R. § 769.2(d)(18) specifically defines a United States bank's implementation of any letter of credit in the United States (without any exception for letters of credit involving foreign beneficiaries) to be an activity in United States commerce. *See* 15 C.F.R. § 769.2(d)(18). The OAC has concluded that its regulatory authority over boycott activities in United States commerce vests it with the power to prohibit United States banks from forwarding anti-Israel language in any letter of credit setting, even where foreign beneficiaries are involved. The mere fact that a separate provision, 15 C.F.R. § 769.2(f), states that its requirements apply only to United States beneficiaries does not necessarily prevent the OAC from applying the separate requirements of 15 C.F.R. § 769.2(d) more broadly. If respondent is aggrieved by this view in this case, it is respondent, not petitioner, who must mount any challenge.

In addition to OAC's determination that 15 C.F.R. § 769.2(d) applies to letter-of-credit transactions involving foreign beneficiaries, at least one commentator has expressed the same view. *See* Howard N. Fenton, III, *Compliance Comments, Letter of Credit Handling Versus Banks' Other Activities; Banks May Yet Face Double Charges for Single LC Transactions*, Boycott Law Bulletin (June 1985), p. 19; Howard N. Fenton, III, *Compliance Comments, Exempting Banks for Forwarding LC Documents May be Good Policy, But It's Not the Law; A Response to John Ellicott*, Boycott Law Bulletin (Nov. 1985), p. 15.

sented. As amici have explained, they account for more than 95% of the $200 billion outstanding in letters of credit and confirmations reported to federal regulatory officials, and they have a critical need to rely on the views of the OAC as to the meaning and application of the anti-boycott laws. The ruling below creates uncertainty in an area that must be clearly defined in order for the amici to engage in letter-of-credit transactions without fear of massive, and unexpected, liability. *See* Amici Curiae Br. 9. The decision below therefore should not go uncorrected based on the misplaced disparagement of the OAC's conclusion that respondent has advanced.

3. Petitioner submits that federal law vests it with an absolute defense to payment because the Antiboycott Regulations prohibit transmittal of the letter-of-credit documents. Respondent claims that no provision of the Antiboycott Regulations applies to this case. Br. in Opp. 7. The OAC, however, has ruled directly to the contrary. Respondent also argues that the literal text of the letters of credit does not violate the Antiboycott Regulations. Br. in Opp. 7. That is true, but immaterial. The supporting documents transmitted by respondent to implement the letters of credit contain declarations prohibited by the regulations, so petitioner cannot forward these documents and obtain reimbursement. Under these circumstances, federal law (if not also the commercial law of Georgia, for that matter) entitle petitioner to an absolute statutory defense to any payment obligation, regardless of what is written in the letter of credit.

Respondent's reliance on common law letter of credit principles is both wrong and irrelevant. Nothing in letter of credit independence principles allows a beneficiary to demand payment based on documents that—due to the beneficiary's inclusion of extraneous language—are worthless and frozen in the bank's hands. *See* Amici Curiae Br. 2-6. No bank absorbs the risk that a beneficiary will hobble the bank in this way.

More importantly, the question in this case is what happens to a bank when a beneficiary gives a bank documents that the bank cannot forward under the Antiboycott Regulations—*viz.*, must the bank pay? 50 U.S.C. App. § 2407(a)(1)(F) answers that question "no." Even if payment would otherwise be required under state law, the bank is expressly insulated by federal law from that liability where it cannot seek reimbursement due to compliance with the Antiboycott Regulations. That is the case here.

4. Respondent argues that petitioner should pay respondent, and then should challenge the OAC position in federal court. Br. in Opp. 11-12. This bizarre solution —which would place petitioner at risk of absorbing an $18 million liability if such a suit were unsuccessful—is scarcely the result dictated by the statute. 50 U.S.C. App. § 2407(a)(1)(F). The statute says that petitioner is relieved of the obligation to pay when it complies with the regulations and ceases to proceed with a letter-of-credit transaction; the statute does not require petitioner to pay and then sue the federal agency to lift the prohibition that interferes with completion of the transaction. Moreover, any such "pay first, sue later" rule would wreak havoc on the domestic banking community, as amici have explained, since banks must be able easily and quickly to gauge their liability on letter-of-credit transactions in order to remain competitive in the international market. *See* Amici Curiae Br. 3 n.3. Respondent's self-serving proposal is therefore no solution at all.

* * * *

CONCLUSION

For the foregoing reasons and those given in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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